

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

KELVIN LORENZO McDANIEL,

Petitioner,

v.

**Civil Action No. 2:07cv99
(Judge Maxwell)**

JOE D. DRIVER,

Respondent.

REPORT AND RECOMMENDATION

On December 4, 2007, the *pro se* petitioner filed a Petition for Writ of Mandamus. Petitioner asserts that he is entitled to be considered for immediate transfer to a Community Correctional Center (“CCC”) without regard to the 10% rule and in accordance with 18 U.S.C. § 3621(b) and the Bureau of Prisons pre-2002 practices. This case is before the undersigned for a preliminary review and Report and Recommendation.

Although the petitioner has provided no background for his petition, information available on PACER establishes that he was sentenced in the United States District Court for the Eastern District of Virginia on June 4, 2007. More specifically, the petitioner was sentenced to a six month term for Bank Fraud and a twenty four month term for Aggravated Identity Theft, the same to be served consecutively. See 3:06cr-00519-JRS-1. The petitioner is currently designated to USP Hazelton with a projected release date of July 20, 2009. See Inmate Locator at bop.gov.

Pursuant to 28 U.S.C. § 1361, “the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” However, the Court’s authority to issue a

writ of mandamus extends only to the issuance of writs necessary or appropriate in aid of its jurisdiction. 28 U.S.C. § 1651. “The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.” Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976). “The party seeking mandamus relief carries the heavy burden of showing that he has no other adequate means to attain the relief he desires and that his right to such relief is clear and indisputable.” In re Beard, 811 F.2d 818, 826 (4th Cir. 1987) (internal quotations omitted). In this instance, the petitioner’s right to relief is not clear and indisputable.

With respect the petitioner’s request that the Court order the Warden to immediately consider him for transfer to a CCC, 18 U.S.C. §3621(b) provides that “[the Bureau of Prisons shall designate the place of the prisoner’s imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate...” Furthermore, the transfer of a convicted and sentenced inmate is within the sound discretion of the Bureau of Prisons. Meachum v. Fano, 427 U.S. 215 (1976). Accordingly, this Court does not have the authority to order that the petitioner be immediately transferred to a CCC.

In addition, to the extent that the petitioner is challenging the BOP’s “10%” rule with respect to CCC placement, that issue is not ripe for review at this time. The Supreme Court has recognized that “[t]he ripeness doctrine ‘is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.’” Nat’l Park Hospitality Ass’n v. Dep’t of Interior, 538 U.S. 803, 807 (2003). “The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or

indeed may not occur at all.” Metzenbaum v. Fed. Energy Regulatory Comm’n, 675 F.2d 1282, 1289-1290 (C.A.D.C. 1982) (citations omitted). The basic rationale of ripeness is

to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967) (overruled on other grounds).

In this case, petitioner is anticipating that the BOP will apply 28 C.F.R. § 570.21 in a manner so as to limit his eligibility for placement in a CCC to the last 10% of his sentence without consideration of the five factors set forth in 18 U.S.C. § 1832(b). The Third Circuit Court of Appeals was the first court of appeals to address the issue raised in the instant case. In Woodall v. Federal Bureau of Prisons, 432 F.3d 235 (3d Cir. 2005), the Third Circuit recognized that the various district courts to address this issue were split as to the validity of the BOP’s 2005 regulations. See Woodall at 244 (collecting cases). However, after analyzing the conflicting opinions, the Third Circuit found the regulation unlawful. Id. Specifically, the Third Circuit found that the governing statute, 18 U.S.C. § 3621(b), “lists five factors that the BOP must consider in making placement and transfer determinations. The 2005 regulations, which categorically limit the amount of time an inmate may be placed in a Community Corrections Center (“CCC”), do not allow the BOP to consider these factors in full.” Id. at 237. More specifically, the Court noted:

[t]he regulations do not allow the BOP to consider the nature and circumstances of an inmate’s offense, his or her history and pertinent characteristics, or most importantly, any statement by the sentencing court concerning a placement recommendation and the purposes for the sentence. And yet, according to the text and history of § 3621, these factors must be taken into account. The regulations are

invalid because the BOP may not categorically remove its ability to consider the explicit factors set forth by Congress in § 3621(b) for making placement and transfer determinations.

Id. at 244; see also Wedelstedt v. Wiley, 477 F.3d 1160 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71, 85-87 (2d Cir. 2006); Fults v. Sanders, 442 F.3d 1088, 1092 (8th Cir. 2006).

Relying on the clear weight of authority, this District has likewise concluded that the challenged regulations are invalid. See Smith v. Gutierrez, 2:06cv121 (N.D.W.Va. Sept. 26, 2007) (Maxwell, Sr. J.); Simcoke v. Phillips, 1:07cv77 (N.D.W.Va. Sept. 18, 2007) (Keeley, C. J.); Jaworski v. Gutierrez, 5:06cv157 (N.D.W.Va. Aug. 23, 2007) (Stamp, Sr. J.); Murdock v. Gutierrez, 3:06cv105 (N.D.W.Va. July 24, 2007) (Bailey, D.J.). However, in doing so, the Court has made clear that such a decision does not entitle any inmate to an Order from this Court directing that he be immediately transferred to a CCC for the last six months of his sentence. Id. In fact, the Court has explicitly noted that the BOP's regulations are invalid only to the extent that an inmate's placement in a CCC is limited to the lessor of 10% of his sentence, or six months, without consideration of the five factors set forth in 18 U.S.C. § 3621(b). Id. Thus, the invalidation of the BOP's regulations merely entitles an inmate to have his CCC placement considered in accordance with the five factors set forth in § 3621(b).

Furthermore, while Congress has mandated CCC placement for federal prisoners, at best, that placement is not required until the last six months of incarceration.¹ However, in order to facilitate that placement, under P.S. 7310.04, the BOP considers an inmate for CCC placement when he or she is within eleven to thirteen months of his or her projected release date. The

¹The statutory mandate for placement of an inmate in pre-release custody is set forth in 18 U.S.C. § 3624(c). Under this provision, petitioner may receive up to a six month stay in a CCC.

petitioner's projected release date is July 20, 2009, more than nineteen months after he filed his Writ of Mandamus. Only when petitioner is within eleven to thirteen months of his projected release date will his Unit Team assess his eligibility for CCC placement and complete an official CCC referral. At that time, petitioners' claim may be ripe for review, depending on the circumstances of the Unit Teams official referral.

Finally, even if the petitioner is entitled to CCC consideration at this time, he is still not entitled to a Writ of Mandamus because there is clearly another means to attain the relief he desires. The petitioner has available to him a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging the BOP's failure to consider him for CCC placement.² Therefore, the petitioner has failed to meet the stringent requirements for invoking a Writ of Mandamus.

IV. RECOMMENDATION

Based on the foregoing, the undersigned recommends that the petition for Writ of Mandamus be **DENIED and DISMISSED** and this case be stricken from the docket.

Any party may file, within ten (10) days after being served with a copy of this Recommendation, with the Clerk of the Court, written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985);

²The undersigned notes that the petitioner has a pending petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 in which he raises the issue of the "10% rule. See 5:07cv133.

United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Clerk of the Court is directed to mail a copy of this Report and Recommendation to the *pro se* petitioner by certified mail, return receipt requested, to his last know address as shown on the docket sheet. The Clerk of the Court is further directed to provide a copy of this Report and Recommendation to all counsel of record, as applicable, as provided in the Administrative Procedures for Electronic Filing in the United States District Court.

DATED: December 31, 2007

/s James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE